Nos. 86-1717 and 86-1718

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In the Supreme Court of the United States

OCTOBER TERM, 1986

KALIMA JENKINS, et al., *Petitioners,*

vs.

STATE OF MISSOURI, et al., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT AND CONSOLIDATED BRIEF IN OPPOSITION FOR NORTH KANSAS CITY SCHOOL DISTRICT, GRANDVIEW CONSOLIDATED SCHOOL DISTRICT C-4, LEE'S SUMMIT REORGANIZED SCHOOL DISTRICT R-7, SCHOOL DISTRICT OF THE CITY OF INDEPENDENCE, FORT OSAGE SCHOOL DISTRICT R-1, BLUE SPRINGS REORGANIZED SCHOOL DISTRICT, SCHOOL DISTRICT OF THE CITY OF LIBERTY, HICKMAN MILLS CONSOLIDATED SCHOOL DISTRICT C-1, CENTER SCHOOL DISTRICT, RAYTOWN CONSOLIDATED SCHOOL DISTRICT C-2 and PARK HILL REORGANIZED SCHOOL DISTRICT NO. V OF PLATTE COUNTY

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REPLY TO QUESTIONS PRESENTED

The questions posed to the Court by the two petitions are not actually presented by the unappealed factual findings and holdings below. Indeed, the questions are premised upon factual assumptions that are contrary to the district court's actual and unappealed findings which specifically established that there were no violations of an interdistrict nature and no violations which had any current significant interdistrict effect. Because of the long-settled and established law in interdistrict school desegregation cases, the factual nature of the decisions below, and the lack of any conflict among the Circuit Courts of Appeals, there is no question worthy of certiorari.

PARTIES TO THE PROCEEDINGS

The plaintiff Jenkins class was a plaintiff/appellant below and is a petitioner here. Petitioner Kansas City, Missouri School District ("KCMSD") was a defendant, cross-claimant/appellant below.

Petitioner KCMSD filed no cross-claims against any of the respondent school districts described below. Thus, KCMSD, having never made a claim against such respondents, has no standing or legal basis on which to present the question it states in its petition, assuming the opinions below actually present the question. KCMSD was found to be a constitutional violator and a nonunitary district.

Respondents North Kansas City School District, Grandview Consolidated School District C-4, Lee's Summit Reorganized School District R-7, School District of the City of Independence, Fort Osage School District R-1, Blue

Springs Reorganized School District, School District of the City of Liberty, Hickman Mills Consolidated School District C-1, Center School District, Raytown Consolidated School District C-2 and Park Hill Reorganized School District No. V of Platte County were all defendants/appellees below. Each of these districts was found to be a unitary district. They are hereinafter referred to as the "respondent districts," and in the decisions below they were often referred to as the "SSDs."*

Respondent United States Department of Housing and Urban Development ("HUD") was a defendant/appellee below.

Respondent State of Missouri (hereinafter sometimes referred to as the "State") was a defendant/appellee-cross-appellant below.

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*As the district court found, "each of the school districts is a locally autonomous and independent entity [and] . . . each defendant district is independent and autonomous from the State of Missouri, and from all other school districts." 300a; *See also* 285a-300. Despite the individual interests of each respondent district, to lessen the Court's burden of reviewing the rather long petitions, these respondents are filing this joint and consolidated opposition brief. In the event of any briefs on the merits, separate briefs may well be filed because of the presence of many individual fact findings and differences among the districts.

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vs.

STATE OF MISSOURI, et al., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT AND CONSOLIDATED BRIEF FOR RESPONDENT DISTRICTS

The respondent districts respectfully pray that this Court deny the two petitions for a writ of certiorari seeking review of the decision of the Court of Appeals for the Eighth Circuit.

ADDITIONAL OPINIONS BELOW

The petitioners omitted from their description of opinions that may be relevant the unpublished July 16, 1984; January 25, 1985; and May 11, 1987 district court orders.

STATEMENT OF THE CASE

Petitioners' statements and factual arguments attempt to rewrite, on a piecemeal and selective basis, some but not all of the district court's orders and unappealed findings.[1]

Petitioners alleged claims of both interdistrict and intradistrict school desegregation violations. These respondent districts were dismissed at the close of petitioners' case on April 2, 1984, pursuant to Fed. R. Civ. P. 41(b). On April 18, 1984, the district court also dismissed the United States Department of Health, Education and Welfare ("HEW"). The district court denied Rule 41(b) motions filed by HUD and the State. Thus, the trial continued on claims of housing-related violations against HUD and intradistrict violations against KCMSD and the State. On June 5, 1984, the district court issued 105 pages of detailed and comprehensive findings in support of the April 2, 1984 dismissal of the respondent districts. On July 16, 1984, the district court issued a comprehensive order in support of HEW's dismissal.

The district court, after completion of the intradistrict trial, issued its September 17, 1984 intradistrict order. It found no housing-related violations by HUD or the State but it did find intradistrict liability against both KCMSD and the State on other grounds, namely the failure to remove all vestiges of a dual system in KCMSD.

Petitioners then presented a remedial plan to force consolidation of the previously dismissed respondent dis-

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1. Most frustrating of all, petitioners argue their evidence without acknowledging that they failed to prove their factual theories. To concoct their questions, the petitions retry their failed evidence on the interdistrict issues as reflected in the June 5, 1984 findings and, at the same time, use that rejected evidence to rewrite some of the findings in the subsequent September 17, 1984 intradistrict order.

tricts. Petitioners theorized that the State had supposedly been found in the September 17, 1984 intradistrict order to have committed interdistrict violations having current significant segregative effects in the respondent districts. On January 25, 1985, the district court rejected petitioners' construction of the September 17, 1984 intradistrict order and required petitioners to submit a remedial plan to remove the dual school vestiges found to exist only in KCMSD. Thereafter, a comprehensive and substantial intradistrict remedial plan for KCMSD was approved.[2]

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2. The petitions suggest that the decisions below resulted in a limited remedy of "compensatory programs" that left rights in "legal limbo." Plaintiffs' Pet. at 9. In seeking attorney fees from the district court, plaintiffs' counsel argued to the contrary. In response to an argument that fees should be reduced because the interdistrict issues were lost, plaintiffs' counsel rejoined:

> [The remedy] included the vindication of the constitutional rights of all blacks in this community and the enhanced opportunities of all present and future children within KCMSD to experience significant educational enhancements.
>
> * * *
>
> [T]he relief plaintiffs obtained is exceptional by any measure, qualitative or monetary, meriting not only a fully compensatory award but an enhanced award as well. Failure to obtain an interdistrict consolidation order in no way detracts from the extraordinary relief obtained.
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> * * *
>
> In cold monetary terms . . . the present "limited" remedy will result in *annual* expenditures of at least $30 million *per year* for educational programs. An additional $49 million to $200 million will be spent over several years to provide improved facilities and additional tens of millions of dollars will be spent each year to provide for magnet schools and voluntary transfers among cooperating school districts. For a program that surely will last for at least a generation, between one-half and one billion dollars will be invested in the education of the children of this community as a result of this litigation. Limited, indeed!

See Suggestions in Support of Motion for Partial Award of Attorney Fees and Expenses at 20 filed February 5, 1986, and Plaintiffs' Reply to State Defendants' Response at 6-7 and 10, filed September 19, 1986.

After the United States Court of Appeals for the Eighth Circuit rendered its December 5, 1986 opinion, the same district court issued its May 11, 1987 order awarding attorney fees to plaintiffs but denying any fee award to KCMSD because it was not a prevailing party against the State.

Plaintiffs spent months of trial trying to prove interdistrict violations by the respondent districts. The thrust of plaintiffs' case was that pre-1954 dual schools caused KCMSD's current student-body racial composition. Plaintiffs concentrated on alleged historical facts to try to show that a so-called "regionalized interdistrict dual system" existed which forced blacks to live only in KCMSD. Plaintiffs also tried to show that school district boundary lines were drawn for impermissible racial reasons; that the respondent districts were not locally autonomous; and that blacks were constrained in residential choices by intentionally impermissible government conduct such as pre-1948 enforcement of restrictive covenants, highway location, urban renewal and the location of public housing. Plaintiffs thus presented a standard interdistrict case that attempted to prove interdistrict violations by the various respondent districts and other government authorities. They also tried to establish that current significant interdistrict effects existed in KCMSD or the respondent districts from the alleged violations. The district court's findings establish that the plaintiffs failed to prove any of those interdistrict violations or current significant effect allegations.

The district court carefully applied the criteria of *Milliken v. Bradley*, 418 U.S. 717 (1974), to determine whether intentional interdistrict violations or current significant interdistrict effects existed. In applying *Milliken*, the district court assumed petitioners' argument that in-

nocent parties could be coerced into mandatory interdistrict remedies if current significant interdistrict effects existed from the violation of some other party. The district court's June 5, 1984 findings described accurately the petitioners' trial theories, which are the same theories adopted in the petitions' questions:

> [F]irst, that the SSDs, as agents of the state, were guilty of operating a regional system of segregated schools that centered on and impacted Kansas City with blacks and made the suburbs whiter before 1954; second, that the SSDs failed in their affirmative duty to eliminate the vestiges of the dual school system; and third, *that the SSDs are liable for the effects of actions by the KCMSD and other defendants and can therefore be included in an interdistrict remedy*. . . .

284a (emphasis supplied). "[W]hen *considered in light of the evidence,*" 284a-85 (emphasis supplied), the district court rejected the factual predicates necessary to support those theories. Indeed, the district court found that plaintiffs' evidence was not only blurred as to cause and effect, but there also was no "careful delineation of the extent of the effect." 496a. In sum, plaintiffs did not prove a constitutional violation in one district that produced a current significant segregative effect in another district.

The following review of the district court's 105 pages of factual findings establishes, as noted above, that the district court found no intentional interdistrict violation by these respondent districts or by any other entity. Moreover, that court found no current significant interdistrict effects in KCMSD or any respondent district resulting from actions by KCMSD or other defendants.

In regard to the absence of the required showing of an intentional interdistrict violation, the district court

found that "[w]itness after witness, including witnesses who had been actively involved in the promotion of civil rights, testified they knew of *no* acts by [the respondent districts] that were done with a discriminatory intent." 278a-79. Those witnesses included the editor of the leading black newspaper, long-time black KCMSD administrators, a former KCMSD board president and a former black KCMSD superintendent. *Id.*

In regard to whether the respondent districts were the product of a violation, the district court found that there was "no credible evidence that any boundaries . . . were established or maintained with any racially discriminatory intent." 294a. These districts were autonomous and not mere agents of the State. 300a. The district court also found that there was a higher degree of local autonomy for school districts in Missouri than any other state having prior interdistrict school cases. 290a-95.

In regard to plaintiffs' historical evidence, the district court found that no "regional black interdistrict system" caused blacks to leave the respondent districts. 306a-07. It also found that "[t]he manner in which blacks in any defendant district were educated [prior to 1954] was solely a matter of local control and within the discretion of the local school district." 307a. The district court found that no "vestiges or significant effects of the pre-1954 dual school system remain in any of the SSDs." 315a. Indeed, the district court found that "transferring blacks to the KCMSD under the prior segregated school system is not a cause of the present racial distribution of the population in the three-county area." 314a. Plaintiff's proof on the issue of transfers was "weak, speculative and de minimis." 301a. The increase in black population in KCMSD was due to "unusual economic and employment ramifications of the World Wars and the Depression."

313a. The district court added that "jobs and economic opportunity were primary motivators for blacks . . . moving to Kansas City and elsewhere. . . ." 314a.

In reviewing the plaintiffs' evidence of effects of supposed violations, the district court found that the theories of plaintiffs' experts either had "intradistrict implications," were related to effects only "within the KCMSD," or did not otherwise implicate any respondent district. 353a, 354a, 367a.

In reference to arguments concerning the extent of black residential dispersion, the district court found that no "ethnic group is racially balanced residentially and no one in this field of study apparently advocates a random dispersal of ethnic groups." 354a. The district court added that "blacks are not constrained within the KCMSD," and "black enrollments in each of the defendant districts have increased fairly steadily since 1968." 357a. An "increase from 1970 of 14,645 blacks" in the area around KCMSD refuted the "barrier theory to black movement." 358a. Further, urban renewal or highway displacement type relocations "had no significant effect on the racial compositions of the enrollment in any SSD." *Id.*

The district court also made findings that no interdistrict effect resulted from racial transition within KCMSD or from KCMSD's own actions. For example, the district court found:

> Actions of the KCMSD in assigning children to particular schools may have had an intradistrict effect . . . [but] those actions [did not] have any significant effect in the enrollment of any . . . SSD.

360a.

The district court reviewed the number of former KCMSD students attending schools in the respondent dis-

tricts, which was the plaintiffs' only attempt to quantify supposed interdistrict effects, and found that even "assuming they all moved to the SSDs because of racial transition within the KCMSD schools, plaintiffs' argument still fails [because] regardless of the impetus behind the moves, the numbers involved are too insignificant to have had a segregative impact on the KCMSD or the SSD." 362a.

The district court found that there was "no evidence [that restrictive covenants] were enforced by the state courts following *Shelley v. Kraemer*" and that "tremendous housing growth in many suburban areas occurred after 1948 when such covenants were a nullity." 363a. There were few covenants in the respondent districts and there were none in some. 363a, 371a-493. Restrictive covenants did not have any significant effect on the racial makeup of any SSD. 363a.

In regard to other housing-related issues, the district court found that "people moved for a variety of reasons, including a desire to be with people of like religious and racial characteristics" and the personal choice of living near middle class persons. 368a. It also found that many housing related issues involved "private" real estate concerns. 368a-69. These respondent districts were not involved in any type of housing violations. Further, in regard to public housing, the district court found that "such housing is available in significant amounts in every defendant district." 365a. These findings are the opposite of and inconsistent with the emotional argument that blacks are "locked in" to KCMSD. KCMSD Pet. at 23.

The district court's July 16, 1984 order dismissing HEW made similar findings of no interdistrict effect.[3]

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3. It was claimed that HEW should have mandated a metropolitan plan in its previous civil rights investigations of KCMSD. HEW concluded that a metropolitan plan was neither required nor necessary for a viable KCMSD intradistrict plan.

The district court found that the "total testimony plaintiffs elicited concerning the current effect" had no credibility because the witnesses conceded that "the process of resegregation [would have continued] and [a KCMSD unitary system] would not have solved the problem in any kind of a permanent or stable way." *See* Order, July 16, 1984 at 13 (petitioners omitted this order from their Appendix). The district court also found that "planned integration in the 1960's would not have significantly affected white flight." *Id.*

In the later September 17, 1984 intradistrict order, no housing-related violation was found against any party. Thus, HUD was dismissed. Because of other, more "salient" reasons, 602a, KCMSD and the State were found liable for intradistrict violations. The district court, however, found no State violations in urban renewal and relocation policies, highway location or public housing location. This intradistrict order reiterated the earlier interdistrict finding that "there has not been a lack of balance between federally assisted housing within KCMSD and the suburban areas," 579a, and, with respect to State-sponsored projects, it "clearly appears that the majority of the units in which [the State] was involved were located outside the KCMSD." 597a.

Having found no interdistrict liability, on the intradistrict issue of how to deal with the "anatomy of KCMSD," 539a, the district court rejected plaintiffs' attempt to retry "the cause of blacks settling . . . within KCMSD." 537a. The court focused on the intradistrict responsibility of KCMSD and the State "regardless of why [blacks] settled in the school district." 538a. It is, therefore, clear that the district court's prior findings of no interdistrict effect or violations were reiterated and confirmed in the September 17, 1984 intradistrict order.

In the intradistrict remedial phase, the district court's January 25, 1985 order (which petitioners omitted from their Appendix although it was in the Appendix in the Court of Appeals) rejected petitioners' plan to consolidate the respondent districts based upon the September 17, 1984 intradistrict order. The district court rejected an interdistrict order because it:

> goes far beyond the nature and extent of the constitutional violation this Court found existed. . . . Clearly a plan which would require the consolidation of suburban school districts, ones in which no constitutional violation *or* significant segregative effect has been found, results in a restructuring and coercion of local government which is prohibited under *Milliken.* I.

Id. at 2 (emphasis supplied). Thus, all that was necessary was a plan to remove "the vestiges of the dual school system as it presently exists *in the KCMSD.*" *Id.* at 3 (emphasis supplied).

Petitioners' factual arguments that significant interdistrict effects existed from the State's supposed, but never specified, interdistrict violation is wrong. The same district court's May 11, 1987 order rejected an award of attorney fees to petitioner KCMSD and held:

> Finally, the KCMSD alleges in its crossclaim, as did the plaintiffs in their complaint, that the State is liable for interdistrict violations. *It is undisputed that the KCMSD and the plaintiffs failed in their attempt to prove an interdistrict liability against the State of Missouri.*

Id. at 13 (emphasis supplied).

In reviewing the district court's findings,[4] the Court of Appeals' majority opinion noted that the district court found that all respondent districts were unitary, 47a; there was no barrier to movement of blacks into the respondent districts, 48a; that any pre-*Brown* acts had negligible present effects, 48a; there were no interdistrict violations from intradistrict factors, 49a; the dissents' factual argument "flies in the face" of the district court's findings that were "not clearly erroneous;" and the "dissent does not establish what the Jenkins class and KCMSD did not argue, that these findings of fact are clearly erroneous," 49a, 51a. Petitioners' arguments were "contrary to" or undermined by the district court findings petitioners did not attack as clearly erroneous. 52a-55.

The majority did not agree with petitioners' appellate argument that the district court had not applied petitioners' legal theory, "[C]ontrary to the argument of the class that the court looked only to the culpability of the SSD's, the scope of the order is far broader." 65a. *See also,* 59a; 72a. The opinion also noted that the district court compared plaintiffs' theories to *Milliken* and that the district court made specific findings that "negate current significant interdistrict effects." 65a-66a. Moreover, the majority correctly observed that there was no finding of a current significant effect from any violation. Thus, after reviewing many findings that no boundaries were

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4. The Court of Appeals' majority preferred the district court's findings over the unproven and unpreserved factual arguments petitioners presented on appeal. The majority observed:

> The broad scope of these arguments is considerably narrowed when viewed in light of significant factual findings of the district court. *These findings are not challenged as clearly erroneous.*

47a (emphasis supplied).

racially motivated, that the districts were autonomous, and that no housing violations were found, the court stated that "these findings pose an insuperable burden to granting interdistrict relief." 74a.

The majority also analyzed the district court's findings that boundaries had not constrained black movement in any way, 74a; pre-*Brown* schools did not prevent blacks from living in the respondent districts, 75a; black enrollment in these districts had steadily increased, 75a; KCMSD's increases in black population were due to the unusual economic and employment ramifications of the World Wars and intervening depression, 75a; personal choice in housing decisions played an important role in residential patterns, 76a; no current effect of restrictive covenants existed, especially in light of the fact that suburban growth occurred after 1948, 77a; there was "no lack of balance" in location of public housing, 81-82a; and facts in other interdistrict cases relied upon by petitioners were "directly contrary to those found here." 83a. Similarly, the court added that the findings made in reference to HUD "belie the possibility of interdistrict effect," 87a, and that the district court's later opinions "certainly make no finding of any interdistrict effect," 90a.[5] Thus, the court concluded:

> [T]he factual findings of the district court effectively foreclose findings of interdistrict effect in the SSDs

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5. In considering the dissenting arguments, Judge Gibson observed, "The dissent embarks upon fact findings of its own . . . This is contrary to the finding of the district court . . . and the dissent makes no effort to consider these statements in a proper Rule 52(a) analysis." 88a. Judge Gibson added that "there simply is no evidence in the record in this case that official housing discrimination caused school segregation and the findings of the district court as we have outlined above so demonstrate." 92a.

> flowing from constitutional violations with respect to housing that may have occurred in KCMSD.
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> * * *
>
> To consider isolated bits of evidence, de minimis in nature, and to mix this with speculation is insufficient . . . The findings made were adequate to dispel the conclusion required by *Milliken* that there be significant segregative effects in the SSDs caused by actions of a constitutional violator in KCMSD.

91a, 93a.

Judge Arnold disagreed with the majority only on housing-related issues because he was unsure whether there were "private" housing violations encouraged by the State and, if so, whether any such violation had current significant interdistrict effects. He suggested a remand to reconsider the findings based on the record at the time of the Rule 41(b) motions. If the district court could not then dismiss the districts, Judge Arnold suggested that the districts produce evidence to show no current significant interdistrict effects of any housing related violations. He, of course, did not have the benefit of the May 11, 1987 order which reiterated the finding that no interdistrict liability against the State had been found.

REASONS THE PETITION SHOULD BE DENIED

The two petitions present questions that, whatever significance they may have in the abstract or in an appropriate case, are not presented here. Both the district court and the Court of Appeals agreed that the facts necessary to establish petitioners' legal theories were not

proved. This Court, of course, sits to decide cases, not abstract or hypothetical questions.[6] The facts of this case —found by a trial judge who saw hundreds of witnesses in many months of trial and affirmed by the Court of Appeals—preclude reaching the abstract questions presented.[7] Petitioners also ignore recent decisions by this Court which compel support of the factual determinations made below. Moreover, there is no conflict among the Circuit Courts of Appeals in the well-settled area of interdistrict school desegregation law. The petitions should, therefore, be denied.

I. THIS CASE, DECIDED ON UNAPPEALED FACTUAL FINDINGS APPLICABLE ONLY TO THESE RESPONDENT DISTRICTS, HAS NO NATIONAL SIGNIFICANCE AND THE QUESTIONS STATED ARE NOT PRESENTED BY THE FACTUAL FINDINGS.

Petitioners assert that the district court and the Court of Appeals' majority have "misread" *Milliken* in regard to

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6. For example, in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), the Court was compelled to dismiss a writ of certiorari as improvidently granted when the question in the petition turned out not to be presented on the record. As Justice Brennan noted:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of [the conflict] can await a day when the issue is posed less abstractly.

Id. at 184.

7. The petitions are obviously designed to create the illusion that the district court found an interdistrict liability, albeit an unspecified one, against the State in its September 17, 1984 intradistrict order. That illusion is contrary to findings in the prior June 5, 1984 findings, the July 16, 1984 HEW Order and the subsequent orders of January 25, 1985 and May 11, 1987.

whether proof of interdistrict effects of constitutional violations by the State or KCMSD would be sufficient to warrant inclusion of the respondent districts in a mandatory interdistrict remedy even if they were themselves innocent of any wrongdoing. Petitioners further assert that because of this misreading of *Milliken*, the lower courts did not undertake an analysis of whether the violations found by the district court had substantial segregative effects in the respondent districts. Petitioners' assertions are wrong. What the petitioners are really complaining about is that the findings showed there were no interdistrict effects.

The liability of the State and KCMSD in the intradistrict proceeding was based on their failure to remove the vestiges of the pre-1954 school system *in KCMSD*. 603-605a. The intradistrict liability was derived from this failure, not from supposed housing violations or an impermissibly vague notion of encouragement of private discrimination. 602a. The district court specifically found that "plaintiffs have not persuaded the Court that any vestiges or significant effects of the pre-1954 dual school system remain in any of the SSDs." 315a. Thus, there was no effect in the respondent districts of the source of the State's intradistrict liability—the pre-1954 dual school system that was not totally eradicated in KCMSD. This and the other unappealed fact findings discussed above undermine petitioners' arguments that a supposed misreading of *Milliken* affected the outcome of this case. The respondent districts prevail under any reading of *Milliken* because the district court found, and the Court of Appeals concurred, that no significant interdistrict effect resulted from any violation by any entity.

Cutting through the petitions' chaff, this is a fact bound case which the plaintiffs lost at trial and on appeal.

Neither the district court nor the Court of Appeals retreated from longstanding precedent or extended previously settled legal principles. The result merely turned on fact findings that are germane and relevant only to this particular case.

The district court conducted a thorough and exhaustive inquiry into the circumstantial and direct evidence adduced on the issue of discriminatory intent. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). No illegal intent was found. Moreover, unlike every other reported interdistrict case, each respondent district took prompt action to comply with *Brown v. Board of Education*, 347 U.S. 483 (1954).

The district court found that no boundary lines were ever drawn for racial reasons. The respondent districts have essentially the same boundaries now as they had before 1930. Further, at least as far back as 1910, KCMSD's boundary, as is common in the North, has not been coterminous with any city's boundaries. Indeed, one of KCMSD's largest areas of white enrollment is located outside the City of Kansas City.

In regard to boundary issues, both petitions strive to make this case analogous to cases involving gerrymandering or racially motivated state legislation by mischaracterizing a 1957 legislative amendment. *See*, for example, Plaintiffs' Pet. at 52-53. That amendment dealt with population levels which affected the permissible size of city school districts. The district court found that the bill, which was known as House Bill No. 171 ("H.B. 171"), had no "racial reasons" when it was first passed in 1897 or later amended upon several occasions. 335a-36. The district court's unappealed fact finding was that the legislation was intended to "avoid administrative con-

fusion and problems" and that the actions of state legislators "were not motivated by racial concerns." 337a-338. As the district court also found, "H.B. 171 was not enacted with the intent to concentrate black students within the KCMSD" and there were no current significant effects from its enactment. 339a. Moreover, as the district court found, KCMSD was never prevented from making any annexation outside of Kansas City as evidenced by its subsequent annexations of white areas. 338a-39.[8] Given these findings, it is undisputed that these respondent districts are not the product of any violation.

The district court found that there was no regionalized interdistrict dual school system and that the *de minimis* number of pre-1954 transfers of black students to KCMSD were not a significant cause of KCMSD's present racial composition. The district court also rejected plaintiffs' expert witness who tried to develop a "depopulation" theory which hypothesized that blacks were gradually forced out of all areas except KCMSD. 305a-316. In its September 17, 1984 intradistrict order, the court reiterated that it rejected that expert opinion "as contrary to the weight of the evidence and as being without sufficient foundation." 532a-33.

The respondent districts did not lure any white students from KCMSD. This simply is not a case involving illegal transfers of white students. *See,* for example, 426a. Moreover, the district court found that these districts did not involve themselves in any housing discrimination. Unlike most other interdistrict cases, a substantial amount of subsidized and public housing exists in these districts.

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8. The district court also found that no illegal racial intent existed in regard to a commission report known as the Spainhower Commission which was never enacted into law. The district court found "no credible evidence . . . to support their allegation that racial concerns led to the defeat of the Spainhower recommendations." 340a.

KCMSD was not racially indentifiable in 1954. Only 18% of its students were black. Because of hundreds of thousands of moves and demographic changes over the past 30 years, KCMSD's black percentage increased. The district court observed that our society was quite dynamic. 501a. The Court of Appeals also observed that one of plaintiffs' experts conceded that the forces at work in central cities after 1954 would have caused KCMSD to become majority black and that many nongovernment-caused factors affected residential choices. 76a.

Plaintiffs' only attempt to quantify any interdistrict effects (regardless of cause) was rejected by the district court because the numbers, whether aggregated or disaggregated, showed at most only a *de minimis* impact on enrollments. 361a-62. Moreover, KCMSD's black enrollment actually decreased by more than 10,000 from 1970 to 1984. At the same time, no "whitening" effects were shown in the respondent districts because, as the district court found, substantial numbers of black families moved there during the late 1960's, the 1970's and even more so in the last few years, some from neighborhoods within KCMSD. 369a. As of 1980, over 23,000 blacks resided outside of what one of plaintiffs' experts called the "principal contiguous area," an increase of 14,645 since 1970. 357a-58. The district court found that this fact refuted any notion of barriers to black moves. 358a. While KCMSD's black enrollment decreased by more than 10,000, black enrollment in these districts increased by more than 3,000 students.[9]

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9. Plaintiffs' Pet. at 28-29, resorts to a non-record argument. That argument violates Fed. R. Evid. 408 with respect to use of a supposed offer of compromise and is highly improper. It also presents an incomplete picture. Unfortu-

(Continued on following page)

As the district court found, and the Court of Appeals affirmed, this is a case which deals with demographic trends unrelated to acts of wrongdoing by governmental entities. There is no showing of any current significant interdistrict effects caused by any violation. Thus, the questions presented in the petitions are not presented by the findings here. This Court recently emphasized the importance of recognizing the trial court's role in making factual determinations under Fed. R. Civ. P. 52. *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985).

For obvious reasons, the petitions never mention *Anderson.* Instead, they attempt to obscure the factual theories petitioners lost by focusing on racial balance disparities and renewing still unproven assertions that were found not to constitute intentional violations. Petitioners simply failed to prove their own trial theories. Two courts below reviewed the evidence and reached the same conclusion; petitioners' dissatisfaction with that reading does not justify denying deference to the fact finding court. In the circumstances here, *Anderson* could not be more applicable.

II. THE LEGAL ISSUES ARE SETTLED AND THE RESULT IN ANY INTERDISTRICT CASE SIMPLY DEPENDS UPON THE FACTUAL FINDINGS MADE IN THAT CASE; THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS.

Milliken is an established case that has, over the past 13 years, provided good and sufficient guidelines for adju-

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Footnote continued—

nately, petitioners have used any response to voluntary plan participation in ways to achieve a perceived litigation advantage. The districts thus concluded that only upon the complete termination of litigation could a proper atmosphere for meaningful consideration of such plans exist.

dicating interdistrict cases. Basically, *Milliken* held that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy", 418 U.S. at 744. The Court recognized, in setting forth the relevant interdistrict standards, that principles of autonomy and local control are firmly rooted in our tradition of government and play a particularly important role in encouraging "educational excellence."

> [The] notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the education process. *See Wright v. Council of the City of Emporia*, 407 U.S. at 469. Thus, in *San Antonio School District v. Rodriquez*, 411 U.S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decision making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and healthy competition for educational excellence."

418 U.S. at 741-42. Due to the importance of such local institutions, interdistrict relief was refused, in part, because:

> [t]o approve the [interdistrict] remedy ordered by the [district] court would impose on the outlying districts, *not shown to have committed any constitutional violation*, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court.

418 U.S. at 745 (emphasis supplied). Here, each respondent district is an exemplary and important public institution that is crucial to the communities it serves. Moreover, there is no finding of a current significant interdistrict effect resulting from any interdistrict violation.

Despite *Milliken's* standards and holding, petitioners assert the respondent districts can be coerced into a mandatory interdistrict remedy merely for alleged wrongs of others. It may well be that petitioners' confusion stems from an erroneous belief that an interdistrict remedy must follow anytime a State is found liable for intradistrict violations. That is not correct because the ultimate remedy in *Milliken* was an intradistrict remedy funded in large part by the State of Michigan.

Milliken set forth the type of discriminatory acts which will constitute interdistrict violations for purposes of determining the availability of an interdistrict remedy.

> Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district or where district lines have been deliberately drawn on the basis of race.

418 U.S. at 745. Neither circumstance exists here and no current significant interdistrict effects were found in any event. There is certainly no other circumstance presented here to compel coercive or mandatory interdistrict remedies.

Milliken's principles were reaffirmed in *Hills v. Gautreaux*, 425 U.S. 284 (1976). *Hills* considered *Milliken's* prohibition against "judicial decree[s] restructuring the operation of local governmental entities that were not implicated in any constitutional violation." *Id.* at 196.

The Court upheld the concerned order in *Hills*, but only after concluding that the remedial order would not consolidate, restructure or impair the rights of the local governmental units. 425 U.S. at 305-06. In discussing *Milliken*, the Court emphasized the needless judicial interference with the operation of the suburban districts in that case:

> [T]he District court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of *local governmental entities that were not implicated in any constitutional violation.*

425 U.S. at 297 (emphasis supplied). The Court held that the "crucial distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution," *Id.* at 297, and the remedy for its wrongs was fashioned so as not to impair the rights of local units of government. The *Hills* court declared that the proposed remedy in *Milliken* was impermissible due to:

> the limits on the federal judicial power to interfere with the operation of the state political entities that were not implicated in unconstitutional conduct. Here, unlike the desegregation remedy found erroneous in *Milliken*, a judicial order directing relief beyond the boundary lines of Chicago will not necessarily entail *coercion of uninvolved governmental units.*

425 U.S. at 298 (emphasis supplied).

Certainly, neither *Milliken* nor *Hills* holds that an interdistrict remedy can be ordered in the absence of a

current significant interdistrict effect from an interdistrict violation. Here, the findings precluded any current significant interdistrict effect or violation. In these circumstances, no court has ever required a mandatory interdistrict order. Nor has any court imposed a mandatory interdistrict remedy upon innocent school districts that were not the product of a gerrymandering-type violation. Thus, there is no basis for granting certiorari because of some alleged conflict among the Circuit Courts of Appeals.

Moreover, the decisions below, as conceded by both petitions, are fully in accord and consistent with *Armour v. Nix*, No. 16708 (N.D. Ga. September 24, 1979), *aff'd*, 446 U.S. 930 (1980); *Goldsboro City Board of Education v. Wayne County Board of Education*, 745 F.2d 324 (4th Cir. 1984); *Tasby v. Estes*, 572 F.2d 1010 (5th Cir. 1978); *Taylor v. Ouachita Parish School Board*, 648 F.2d 959 (5th Cir. 1981); *Lee v. Lee County Board of Education*, 639 F.2d 1243 (5th Cir. 1981); *Berry v. School District of Benton Harbor*, 698 F.2d 813 (6th Cir.), *cert. denied*, 464 U.S. 892 (1983); *Liddell v. State*, 731 F.2d 1294 (8th Cir. 1984), *cert. denied*, 469 U.S. 216 (1984); and *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 2926 (1986). *See also, Bronson v. Board of Education*, 578 F. Supp. 1091 (S.D. Ohio 1984), *aff'd*, 687 F.2d 836 (6th Cir. 1982) and *Bell v. Board of Education, Akron Public Schools*, 491 F. Supp. 916 (N.D. Ohio 1980), *aff'd*, 683 F.2d 963 (6th Cir. 1982).

The Eighth Circuit's majority recognized that such cases had "great force" and that *Goldsboro*, for example, presented "many similarities to the case before us." 100a-101. Indeed, in those cases, just as here, the trial courts made findings that no boundaries had been drawn or

maintained on the basis of race; that pre-1954 transfers (which, unlike here, did not stop immediately after *Brown*) had no current effect; that the outlying districts were either unitary or being operated in accordance with a court plan; and that there was no district cooperation with other governmental bodies to maintain racially identifiable schools. Here, there also was no imbalance in public housing location.

The petitions are wrong in asserting that a conflict exists with decisions from the Third or Seventh Circuits. *See Evans v. Buchanan,* 393 F. Supp. 428 (D. Del.), *aff'd,* 423 U.S. 963 (1975) and *United States v. Board of School Commissioners of Indianapolis,* 456 F. Supp. 185 (S.D. Ind. 1978) (Indianapolis interdistrict case), *aff'd in part and vacated in part,* 637 F.2d 1101 (7th Cir. 1980), *cert. denied,* 449 U.S. 838 (1980). These cases involve no more than intentional illegal gerrymandering coupled with imbalances in public housing location. They are also cases in which current significant effects of violations were found. Thus, what exists are differences in the controlling and important facts. When a boundary is created with discriminatory intent, as in the cases petitioners cite, the resulting districts are implicated in the violation and thus no deference to local government structure is required. Here, no such interdistrict violation or "interdistrict regionalized dual system" existed. Thus, no interdistrict presumption of failure to satisfy any affirmative duty to merge existed.

Neither the district court nor the Court of Appeals found any conflict with the decisions petitioners cite. Indeed, as the majority noted:

> These cases all involve governmental action fixing or ignoring boundaries with discriminatory intent. The

> findings in the case before us are to the contrary. These cases are therefore distinguishable as are the boundary cases such as *Morrilton,* considered by this court. See Part IV, *supra.* These decisions upon which the Jenkins class so heavily relies, when viewed in light of the findings made by the district court, *plainly have no applicability to the present case.* . . .

99a (emphasis supplied); *see also* 95a.

In *Evans,* a pre-*Washington v. Davis* case, school districts except for the predominantly black Wilmington district were consolidated under a 1968 state law. That law allowed, for a one-year period, district reorganizations except for the Wilmington district. In concluding that such gerrymandering legislation was a violation, a pure disparate impact rationale was applied. *Evans* was, however, limited by the intent requirement announced later in *Washington v. Davis. See, Goldsboro, supra* at 330-332. Here, no intentional violation was found. Further, unlike here, interdistrict effects were found to exist. Thus, no conflict exists; far differing facts apply.[10]

Nor is the *Indianapolis* case in conflict. Once again, far different facts existed. All area governmental operations except school districts were consolidated in a State-passed legislative Uni-Gov concept. Illegal racial intent was found to exist in the passage of that 1970's Uni-Gov legislation. The opposite is true here. Indeed, a complex multiplicity of State and local governmental entities exists here. *No* illegal intentional racial legislation was found to exist. The vital and long established unitary districts

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10. The dissent acknowledged that "proof of disparate impact on the SSDs is not enough to hold the SSDs liable and provide the basis of interdistrict relief," 262a. Significantly, the dissent also conceded that the absence of violations by these districts had significance. 178a and 266a.

here are *not* the "product of a violation" as was the case in *Indianapolis*.[11] Further, unlike here, there was a lack of balance in public housing location in the *Indianapolis* case.

Missouri school district boundaries are established by local votes and *not* by a State Board of Education. Moreover, the district court found that in Missouri there is a great amount of local autonomy in school districts. Indeed, the degree of autonomy was greater than in *Milliken, Evans v. Buchanan* or the *Indianapolis* case. The lack of local control was, of course, important to the decisions in both *Evans* and *Indianapolis*.

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11. Like *Evans* and *Indianapolis*, cases such as *Hoots v. Pennsylvania*, 672 F.2d 1107 (3rd Cir.), *cert. denied*, 459 U.S. 877 (1982), and *Newburg Area Council, Inc. v. Bd. of Educ.*, 510 F.2d 1358 (6th Cir. 1974) (Louisville interdistrict case), *cert. denied*, 421 U.S. 931 (1975), involve gerrymandering. *Newburg* also involved illegal white transfers to the suburbs. Moreover, both Pennsylvania and Kentucky had far different educational systems with little local autonomy. Here, the finding established just the opposite. Interestingly, the subsequent *Berry*, 698 F.2d 813, and *Bell*, 683 F.2d 963, cases from the Sixth Circuit show that no conflict could possibly exist in this area. Those cases show that results just depend upon the locally relevant factual findings and the varying State approaches to local educational autonomy. The *Bell* court did not find any conflict with previous decisions. *Bell*, 683 F.2d at 968.

In the *Indianapolis* case, the Seventh Circuit also rejected evidence of realtor practices and other forms of private discrimination. 637 F.2d at 1109 n.15. Violations by the city housing authority were cited but, unlike here where no housing authority was a party except HUD which was dismissed, it was a party against whom relief was sought and, unlike here, there was an imbalance in public housing location. *Id.* at 1117. Districts not involved in significant violations were dismissed. *United States v. Board of Commissioners of Indianapolis*, 503 F.2d 68, 73-74, 78-80, 86 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975)

Parenthetically, it can be noted in regard to housing-related issues, Judge Arnold, recognized the factual nature of the relevant inquiry. He also observed that the opinion "does not make law for this Circuit. . . ." 180a. Thus, no possible conflict among Circuit Courts of Appeals could exist in any event.

This is not a situation where any of the Courts of Appeals have recognized or stated that a conflict exists. To the contrary, any difference among the cases is not the legal principles applied but simply the result of differing and meaningful underlying factual findings. *See,* for example, *Goldsboro, supra* at 330-332.

The absence of intentional violations, the findings of no current significant interdistrict effect, the differing structure of the educational organization in the State, the lack of any gerrymandering and many other unique local facts such as the lack of imbalance in public housing location makes this case far stronger than any other interdistrict case, including *Milliken.* Thus, there is no reason to review settled issues which have not troubled this Court for the past 13 years. Any subsequent interdistrict case that may occur elsewhere will depend upon the local facts developed at trial.

CONCLUSION

The petitions should be denied. The questions stated are not presented. Moreover, the case is so fact sensitive on local matters that no purpose would be served by certiorari. The law is well settled and no conflict among the Courts of Appeals exists. The result in any case is dependent largely upon the locally governing facts as found by the trial judge.

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